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THE EMELIE BUILDING
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June 2, 2023

VIA ELECTRONIC MAIL

Jacque Chosnek,
Attorney for the City of Lafayette
515 Columbia St.
Lafayette, IN 47901
jchosnek@lafayette.in.gov

Re: Lafayette Ordinance 2023-23 (Annexation)

Dear Jacque:

I am writing on behalf of our client, the Town of Dayton, as a follow up to our conversation of last week and in advance of the public hearing for Ordinance 2023-23 scheduled for Monday, June 5. I ask that this letter be read into and made a part of the record of the public hearing. I am attaching my prior letters relating to the proposed annexation as well as a prior letter to the City directly from the Dayton Town Council, which I would also like to be made a part of the record. The Town of Dayton also asks that previous in-person comments made by Town representatives and others, including me, on behalf of the Town be made a part of the record for the upcoming public hearing. In past communications, the Town has gone to great lengths to explain the numerous reasons why the Town objects to this annexation and why the Town has implored the City Council not to approve it. In this letter, I do not intend to reiterate those reasons or again discuss the long-term damage this annexation will cause to the Town. Instead, I intend to focus on legal issues, issues that will need to be resolved by a court of law if the City moves forward with this annexation.

First, I will again direct your attention to the existing water and sewer contracts between the Town of Dayton and the City of Lafayette. These contracts define and fix the Town of Dayton utility jurisdiction for water and wastewater service as "the area bounded by County Road 200 South on the north to County Road 800 East and then south along the south fork of Wildcat Creek on the east to Wyandotte Road on the south and to Interstate 65 on the west." See the Municipal Wastewater Service Agreement, Third Addendum, dated February 13, 1995, and the Water Agreement dated February 13, 1995. By these agreements, the City agreed that it would have jurisdiction and responsibility up to the point of service, and the Town of Dayton would jurisdiction and responsibility beyond the point of service in this expressly defined area. The property that is proposed to be annexed lies entirely within Dayton's water and wastewater service jurisdiction. However, the City's adoption of the proposed annexation will unilaterally remove the subject property from the Town's jurisdiction. Under Indiana law, a municipality has exclusive jurisdiction over the water and sewers within its corporate boundaries. See IC 36-1-3-9;

Jacque Chosnek,
Attorney for the City of Lafayette

June 2, 2023
Page 2

Town of Plainfield v. Town of Avon, 757 N.E.2d 705, 711 (Ind. App, 2001). Thus, the very act of annexing property will divest the Town of its utility jurisdiction, violating the contracts and rendering them meaningless and thereby causing incalculable and irreparable harm to the Town of Dayton. The City's intent in this regard is confirmed by its own fiscal plan, in which the City commits to provide utilities to the property.

Second, there are certain procedural and statutory defects that in our opinion will render this annexation ordinance invalid. This annexation is proceeding as a "super-voluntary annexation" under IC 36-4-3-5.1, despite there being one parcel included, owned the State of Indiana, for which there is no signature. We mentioned this in connection with the previously filed and later abandoned annexation petition, but it has not been corrected with the present petition. In addition, the public hearing is being held more than thirty days after the filing of the annexation petition in violation of IC 36-4-3-5.1(e). By the very words of the statute, the City must hold its public hearing "no later than" thirty days after the filing of the petition. In our opinion, any public hearing after the expiration of the thirty days would be invalid and the ordinance, if adopted in reliance on the public hearing, would also be invalid.

For all the reasons discussed to this date, the Town of Dayton continues to ask the City Council not to approve the annexation ordinance. That said, the Town cannot stand by while its rights and its interests are ignored and discarded. If the City approves the annexation, the Town will have no choice but to seek intervention of the courts for a determination of each party's rights with respect to the property being annexed and the remainder of the Town's utility jurisdiction, to set aside the annexation ordinance, and to recover damages caused by the City's breach of the sewer and water contracts.

Please feel free to contact me if you have any questions or wish to discuss this further.

Very truly yours,

Stoll Keenon Ogden PLLC

A handwritten signature in black ink, appearing to read "Chris Wischer", written over a horizontal line.

Christopher C. Wischer

CCW:JG
Enclosures

cc: Jen Manago, Dayton Town Council President
jen.manago@dayton.in.gov

ENCLOSURES



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March 3, 2023

VIA ELECTRONIC MAIL

City of Lafayette, Indiana

Attn: Mayor Roswarski and Lafayette City Council

Emailed to: Web-mayor@lafayette.in.gov MWiliamson@lafayette.in.gov
 LAhlersmeyer@lafayette.in.gov EHWeiss@lafayette.in.gov
 KKlinkere@lafayette.in.gov JReynolds@lafayette.in.gov
 PBrown@lafayette.in.gov NNargi@lafayette.in.gov
 SSnyder@lafayette.in.gov BDowning@lafayette.in.gov

Re: Objection to City of Lafayette Annexation Ordinance 2023-07

Dear Mr. Mayor and City Councilors:

This law firm represents the Town of Dayton, Indiana. We are writing about the annexation being proposed by the City of Lafayette in Ordinance 2023-07, which is scheduled for public hearing on March 6, 2023. The Dayton Town Council objects to the proposed annexation. The reasons for the Council's objections are set forth in a separate letter from the Dayton Town Council to you being delivered simultaneously with this letter. The purpose of this letter is to make you aware of legal and technical issues we discovered in our review of the proposed annexation.

The City of Lafayette is proceeding with this annexation as if it is a "super voluntary" annexation under Section 5.1 of the annexation code (IC 36-4-3-5.1). Section 5.1 requires 100% of the owners within the territory being annexed to sign the petition requesting the annexation. The current petition was not signed by 100% of the owners. The proposed annexation territory includes Parcel #79-12-05-100-002.000-012, which is owned by the State of Indiana, but the State of Indiana has not signed a petition. Consequently, the proposed annexation cannot proceed as a "super voluntary" annexation under Section 5.1.

The City may believe that the State's parcel does not matter because it is tax exempt. This is incorrect. Please note that while other sections of the annexation code contain special rules for treatment of tax-exempt parcels, Section 5.1 makes no mention of tax-exempt parcels. In our opinion, tax exempt parcels must be considered when determining whether the 100%

March 3, 2023

Page 2

requirement of Section 5.1 has been met. Consequently, any attempt to force the current annexation through under Section 5.1 without signature by all owners, including the State of Indiana, would be illegal and invalid.

In addition, your petitioner may not have legal authority to make this petition. According to our review of the Indiana Secretary of State's records, the sole petitioner, Carr Family Farm, LLC, was administratively dissolved in 2004. Moreover, the records show that the name of the limited liability company was assigned to a new and separate limited liability company with different ownership in 2012. I am attaching relevant information from the Secretary of State's website for your reference. If this is correct, then your petitioner is not a legal entity in good standing and does not have the legal authority to do anything except wind up the dissolved LLC.

The Town of Dayton intends to appear at the public hearing and state its objections to the proposed annexation. In the meantime, if you have any questions or would like to discuss this further, my direct number and email address are listed above.

Sincerely,
Stoll Keenon Ogden PLLC

A handwritten signature in black ink, appearing to read "Chris Wischer", with a stylized flourish at the end.

Christopher C. Wischer

cc: Jacque Chosnek, City Attorney, JChosnek@lafayette.in.gov

CCW:JG

128960.177297/901338

Town of Dayton

PO Box 557, Dayton, IN 47941
(765) 296-2533 FAX (765) 296-4212

March 3, 2023

Clerk-
Treasurer
Ron Koehler,
Ex-Officio

Council
Members
Jen Manago
President

Stan Kyger
Vice-
President

Ron Koehler
President-
Utilities

Carla
Snodgrass
Area Plan
Commission

Marc
Buhrmester
Building &
Maintenance

Dear Mr. Mayor and City Councilors,

We were quite surprised how the Dayton Town Council found out about the proposed annexation of the Carr property into Lafayette. That information wasn't discovered until after the Lafayette City Council had taken its first vote on the matter. The Town of Dayton was not informed or consulted prior to or since that vote. We would not be surprised if many or all of the Lafayette City Council members are only now being made aware that we were not informed. It appears that courtesy and respect are the enemy of "progress."

In 2019, Dayton sought to annex the Carr property and other properties adjacent to that area. One of those adjacent properties was land owned by Dayton that exists outside of its incorporated boundaries. This annexation was sought with the intention of fulfilling the Comprehensive Plan that has been in place since 1981. This area was to become Dayton's Economic Development Area. The plan includes light industry, an office/research park, retail shopping, dining, low density housing, and a Town Park (something comparable to Veterans Memorial Parkway in southern Lafayette). The plan also includes a north/south collector road to service this area commonly known as Yost Drive. With the understanding that the above mentioned properties would be developed per the Comprehensive Plan, the Town of Dayton gave its Notice to Proceed (NTP) with preliminary engineering services for Yost Drive to Butler Fairman & Seufert on November 13, 2019. The projected cost for Yost Drive was approximately \$4,000,000. The Town of Dayton would be responsible for 25% of the cost with the rest paid for with grants.

In early 2019, the Dayton Town Council held meetings to discuss the annexation of the properties and creation of a Redevelopment Commission (RDC) and Tax Increment Financing (TIF) district. The TIF allocation area would include land currently within Dayton's incorporated boundary and the proposed County area to be annexed. The RDC was created and the TIF district established as the "38@65 Economic Development Area." On December 16, 2019, the Board of Commissioners pledged the increased property tax proceeds to the newly created TIF district.

On May 2, 2020, Dayton Town Attorney, Reid Murtaugh, emailed property owners in the area to request the voluntary annexation of their property. Neither Carr nor the other property owners has ever formally responded to this request. The reason this had not been done in 2019 is because state law prohibits an annexation ordinance from becoming effective during the year preceding a federal

decennial census.

Up to this point, everything seemed to be going fine for all involved. Economic growth in a manner that suited the desires of Dayton was starting to be realized. The fulfillment of the Land Use Plan would provide many jobs, housing, and entertainment. The water and sewer needs for the area would be serviced by Dayton. The area is included in the Utility Agreements with the City of Lafayette dating back to 1995. In fact, the Agreements give Dayton a utility jurisdiction area which encompasses nearly three-square miles to provide for the growth of Dayton.

Unfortunately, trouble was brewing. It appears that the Comprehensive Plan conflicted with the desires of the current County Commissioners. The massive McCarty Lane – Southeast Industrial Expansion Economic Development Area was growing rapidly and it soon became apparent to a newly elected Dayton Town Council that the completion of Yost Drive was not intended to be for the benefit of Dayton and its Land Use Plan but instead, a thoroughfare for I-65 truck traffic to and from the current and future warehouses in the McCarty Lane Development area.

On June 17, 2020, just a little over a month and a half after Dayton's Town attorney requested voluntary annexation from property owners in the area, the Area Plan Commission (APC) voted 10-3 to rezone the Carr property from A to I3. This was against the APC's long standing Comprehensive Plan, the wishes of the Town of Dayton, and the recommendation of the APC Staff. This heavy industrial rezoning was approved by the County Commissioners on July 6, 2020.

Dayton now faced a real dilemma. Our area of jurisdiction had just been rezoned against our wishes. It became apparent that this rezoning was to allow a massive warehouse complex, not the economic development plan that was put in place to enhance Dayton. Even after this, the expectation remained that Dayton would fund Yost Drive. This road would service nothing more than heavy duty trucks and semis traveling to and from the land of warehouses. To that end, the Town of Dayton chose to withdraw from the Yost Drive project on September 14, 2020. The Town had to pay for engineering costs incurred up to that point but that amount was just a fraction of the cost the Town would have incurred if the road had been completed on Dayton's dime.

On October 5, 2020, the county withdrew the property tax proceeds previously pledged to the Dayton TIF district. This effectively halved the tax revenue of the Dayton RDC. On June 15, 2021, the Tippecanoe Economic Development Commission adopted a declaratory resolution amending the McCarty Lane – Southeast Industrial Expansion Economic Development Area into the same area Dayton had sought to annex. On November 1, 2021, the Tippecanoe County Board of Commissioners gave their approval, and the industrial expansion had gained a foothold east of I-65. This intentionally damaged Dayton and its future.

Yost Drive has yet another interesting twist. Exactly where will it be built? Dayton officials have repeatedly asked County officials and the Carr representatives this question. They

have all been suspiciously elusive in providing any answers. We realize there is a reason for that. The original location for the road was to be on property that is owned by the Town of Dayton. A part of this land is within Dayton Town limits and the remainder of it lies in the county. It includes approximately eleven acres of land (that is the width of a road) running from Haggarty Lane to SR38. Under this land is the waterline which supplies Dayton's water. This was installed and paid for by Dayton approximately thirty years ago. Of course, Yost Road could be built on the Carr property. It is going to dead end into a cul-de-sac after all. No official will provide clarity on where the road will be built but the truth will show an insensitive and cruel disregard for Dayton.

Interestingly enough, the new projected cost for Yost Drive is now \$10.5 million - over two-and-one-half times the original projection. Since the road will not extend into Dayton property and join with SR38, the new configuration of the road must only be half as long as originally planned. Based on the current estimates, it appears that Dayton was wise to have withdrawn its participation in the road. Significant cost overruns appear to have been likely and, once committed, there would have been no backing out. It appears now that all of the taxpayers in Tippecanoe County will be on the hook.

To continue to add insult to injury, on December 13, 2021, the Carr family and their attorney asked the Town of Dayton to sign a "Will Serve" letter committing to provide water and sewer to their property. This request was done to make the Carr property more marketable to developers because it would be "shovel ready". This is property that was rezoned to a designation against the desires of the Town and removed from our control but still within our utility jurisdiction. The Dayton Town Council's response was that like always, they wanted to deal with the end user of the utility, not the current property owner.

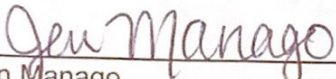
It has been reported that Lafayette will soon be adding the three hundred plus acres of the Steele property to its industrial engine. That is uncontested and will provide an abundance of land for Lafayette's expansion. There is vast, uninhabited acreage north of Haggerty and east of I-65 for yet more expansion. It is highly likely that access to I-65 via McCarty Lane will occur in the future. That would be the perfect scenario as it could service all of this area and would be mostly dedicated to truck traffic.

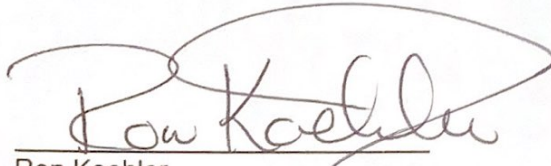
So, this brings us to today. There is an irony in the fate of Dayton's future being decided by nine members of the Lafayette City Council. Nine people who, until now, may not have been informed as to the behind the scenes wrangling that has occurred. These nine people are not residents of Dayton. Dayton is not against progress and has a need for the land you are being asked to annex. We want to control our own destiny.

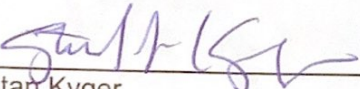
We are in the process of completing a long-needed Comprehensive Plan; a plan that encompasses the land your vote would annex into Lafayette and put out of Dayton's control. Dayton's Comprehensive Plan may very well be the impetus for the timing of the Carr's voluntary annexation request. We are in the process of creating a Community Center for the Town and discussing solar power for our Police station. We are moving forward, and will continue to do so.

You are being given an opportunity to make history with your vote. Only by voting against this annexation will you fall on the right side of history.

Yours truly,
Dayton Town Council


Jen Manago


Ron Koehler


Stan Kyger


Carla Snodgrass


Marc Buhrmester



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March 8, 2023

VIA ELECTRONIC MAIL

City of Lafayette, Indiana

Attn: Mayor Roswarski and Lafayette City Council

Emailed to: Web-mayor@lafayette.in.gov MWilliamson@lafayette.in.gov
 LAhlersmeyer@lafayette.in.gov EHWeiss@lafayette.in.gov
 KKlinker@lafayette.in.gov JReynolds@lafayette.in.gov
 PBrown@lafayette.in.gov NNargi@lafayette.in.gov
 SSnyder@lafayette.in.gov BDowning@lafayette.in.gov

Re: Follow up on behalf of the Town of Dayton

Dear Mr. Mayor and City Councilors:

I am writing again on behalf of the Town of Dayton and the Dayton Town Council regarding the property that was the subject of City Ordinance 2023-07, the petition for which was withdrawn during your most recent City Council meeting (the "Carr Property").

As you are aware, the Carr Property is a part of a larger area that has long been a critical part of the Town of Dayton's plans for growth. Over the years, the Town has expended a significant amount of time and money toward the ultimate goal of annexing this area into the Town of Dayton. It's true that obstacles to this plan have arisen over the past two or three years, including the County's rezoning of the Carr Property over the objections of the Town and the property owner's recent petition to the City of Lafayette for annexation. However, please know that the Town of Dayton is intent on overcoming these obstacles and completing its vision for growth, including the Town's continued pursuit of annexation.

To that end, I am attaching a copy of a Resolution that will be considered by the Dayton Town Council at a special called meeting to be held at 7:00 P.M. tonight at the Dayton Town Hall. The purpose of the Resolution is to initiate the annexation process for what is referred to as the North Dayton Annexation Area, an annexation area that includes the Carr Property. The addition of this area to the Town of Dayton is critical to the future growth and prosperity of the Town. The annexation of the Carr Property into the City of Lafayette would do much more damage to the Town of Dayton than it will benefit the City of Lafayette.

March 8, 2023

Page 2

The Town of Dayton would like the opportunity to sit down with the Mayor, the appropriate representatives of the City Council and any City personnel that the City would like to include for purposes of discussing this matter in more detail. The Town is hopeful that through those discussions both parties could come to an understanding and agreement on how this matter may proceed to the benefit of the City, the Town and the region. I would be happy to help facilitate that meeting. I can be reached at my direct number, 812-452-3595, or by email at chris.wischer@skofirm.com. Please contact me to schedule a meeting and/or if you have any questions. We appreciate your time and attention to this matter.

Sincerely,
Stoll Keenon Ogden PLLC

A handwritten signature in black ink, appearing to read "Chris Wischer", with a large, stylized initial "C" and a long, sweeping horizontal stroke extending to the right.

Christopher C. Wischer

cc: Jacque Chosnek, City Attorney, JChosnek@lafayette.in.gov

CCW:JG

Enclosure

128960.177297/9022961

RESOLUTION 2023-_____

**A RESOLUTION CONCERNING THE INITIATION OF PROCEEDINGS
TO CONSIDER A PROPOSED ANNEXATION BY
THE TOWN OF DAYTON, INDIANA
(North Dayton Annexation Area)**

WHEREAS, the Town of Dayton ("Town") has studied the Town's municipal boundaries, surrounding territory, provision of local government services, and opportunities for growth and development of the Town and its surrounding community; and

WHEREAS, the Town has identified potential areas outside of the Town's current municipal boundaries for consideration of annexation to the Town, including the "North Dayton Annexation Area", depicted on the map attached hereto as Exhibit A; and

WHEREAS, pursuant to IC 36-4-3-1.7, the Town is required to conduct an outreach program not earlier than six months before the introduction of an annexation ordinance to inform citizens regarding the North Dayton Annexation Area;

WHEREAS, the Town intends to conduct such an outreach program and will provide notice to landowners of the dates, times, and locations of the required public information meetings to provide citizens with information regarding the proposed annexation;

WHEREAS, the Town intends to finalize and adopt a written fiscal plan for the provision of capital and noncapital services to the North Dayton Annexation Area in compliance with IC 36-4-3-3.1 and meeting the requirements of IC 36-3-3-13;

WHEREAS, the Town now desires to adopt this Resolution as its first official step initiating the necessary process for consideration of the annexation of the North Dayton Annexation Area as more particularly set forth herein;

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF DAYTON, INDIANA, AS FOLLOWS:

SECTION 1. The Town hereby initiates the process for considering the annexation of the North Dayton Annexation Area, as depicted on the map attached hereto Exhibit A and incorporated herein by reference.

SECTION 2. The Town shall conduct an outreach program meeting the requirements of IC 36-4-3-1.7.

SECTION 3. The Town shall proceed to establish and adopt a written fiscal plan for the provision of capital and noncapital services to the North Dayton Annexation Area in compliance IC 36-11-3-3.1 meeting the requirements of IC 36-4-3-13.

SECTION 4. The North Dayton Annexation Area is a part of a continuing process for annexation review and consideration by the Town. The Town reserves the right to amend this resolution and/or the North Dayton Annexation Area as may be permitted or required by Ind. Code § 36-4-3 *et seq.*

SECTION 4. The provisions and descriptions of this Resolution are severable, and if a court of competent jurisdiction determines any portion(s) invalid for any reason, such determination shall not affect the remaining portions thereof.

ADOPTED this ____ day of _____ by the Town Council of the Town of Dayton, Indiana.

Town Council President

Member

Member

Member

Member

Attest:

Clerk-Treasurer

Exhibit A

North Dayton Annexation Area

***** *Map to be attached* *****



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April 28, 2023

VIA ELECTRONIC MAIL

City of Lafayette, Indiana

Attn: Mayor Roswarski and Lafayette City Council

Emailed to: Web-mayor@lafayette.in.gov MWiliamson@lafayette.in.gov
 LAhlersmeyer@lafayette.in.gov EHWeiss@lafayette.in.gov
 KKlinker@lafayette.in.gov JReynolds@lafayette.in.gov
 PBrown@lafayette.in.gov NNargi@lafayette.in.gov
 SSnyder@lafayette.in.gov BDowning@lafayette.in.gov

Re: Follow up on behalf of the Town of Dayton

Dear Mr. Mayor and City Councilors:

I am writing again on behalf of the Town of Dayton and the Dayton Town Council. We are aware that a new Petition has been filed requesting annexation of the Carr Property into the City of Lafayette. Ordinance 2023-23, an ordinance that would effectuate that request, is on your agenda May 1 for First Reading. This annexation would cause irrevocable damage to the Town of Dayton. For that reason, the Town urges you vote no on the Ordinance, preferably on First Reading.

As we have shared with you previously, the Carr Property is part of an area west of I65 and adjacent to the entire northern boundary of the Town of Dayton and has been a part of Dayton's plans for growth for decades, as reflected in the Comprehensive Land Use Plan that was adopted as a joint effort between the Town of Dayton and Tippecanoe County in 1981 and amended in 1987, and as reflected in the current and ongoing discussions toward a new updated Comprehensive Plan. The Carr Property is also included as part of the area established as Dayton's utility jurisdiction in long standing water and sewer agreements between the Town of Dayton and the City of Lafayette. In these agreements, the Town and the City agreed that the Town would have the right to provide sewer and water service to the area. In reliance on the agreements, the Town of Dayton has made significant investments in water and sewer utility infrastructure over the years and stands ready and able to serve the area. The Town intends to serve this area and has believed that annexation of the area would ultimately occur when sewer and water services were extended, if not before.

April 28, 2023

Page 2

In light of recent events, the Dayton Town Council decided to take action to protect its plans for growth and the long-term future of the Town. On March 8, the Dayton Town Council adopted a Resolution to initiate the annexation process as to a part of its utility jurisdiction that includes the Carr Property (the North Dayton Annexation Area). A copy of the Resolution was provided to you by email dated March 9. The Town has hired a financial consultant to prepare a fiscal plan for the annexation of the North Dayton Annexation Area. Tax impact data has been gathered and meetings are being scheduled with property owners. Lafayette's consideration of Ordinance 2023-23 is in direct conflict with Dayton's current annexation plan and process.

I would also like to make you aware that members of the Town Council and I met with Mr. Carr on March 28. This was after Carr's withdrawal of the original petition and after Mayor Roswarski insisted that Mr. Carr meet with us. (Thank you, Mr. Mayor.) However, despite the Town's immediate acquiescence to most of Mr. Carr's demands and despite the Town's stated intentions to continue good faith negotiations on the rest, Mr. Carr immediately filed a new petition with the City of Lafayette. In fact it appears that Carr signed the petition March 23, five days before our meeting. It is apparent to us that Mr. Carr viewed our meeting as a box he needed to check before going back to the City. He even stated that the City was waiting with open arms if the Town did not give in to each and every demand. Hopefully, that is not the case.

The Town has no choice but to fight for its future and to use all available legal means to protect its rights, including litigation if necessary. Of course, we all hope that will not be necessary. The Town also understands that you did not ask for this annexation. Rather, the annexation is being asked of you. That said, it is certainly within your power to say no. This is a request for super voluntary annexation under Section 5 of the Indiana's annexation statutes. Your consideration of such a request is entirely discretionary on your part, and (because of certain population density requirements) the property owner cannot force you to annex the property. You are not even required to hold a public hearing. Simply by rejecting this ordinance on first reading, you could dispose of this matter and reestablish the status quo. The Town of Dayton respectfully asks that you do so.

If you have any questions or would like the opportunity to discuss this with me or representatives of the Town of Dayton, please feel free to reach out to me. I can be reached at my direct number, 812-452-3595, or by email at chris.wischer@skofirm.com.

April 28, 2023
Page 3

Sincerely,
Stoll Keenon Ogden PLLC

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Christopher C. Wischer

cc: Jacque Chosnek, City Attorney, JChosnek@lafayette.in.gov

CCW:JG